M B C NEWSLETTER

MISSISSIPPI BANKRUPTCY CONFERENCE

Editors: Robert Byrd and William P. Wessler **Fall 2009**

NEWS FROM THE SOUTHERN DISTRICT

Danny L. Miller, Clerk of the Court

The Southern District of Mississippi has seen a significant increase in bankruptcy filings during the last year as the national economy has struggled to shake off a recession and high unemployment. In the face of a rising case load, the Clerk's office has also been working to enhance service delivery to court users through technology enhancements.

The Clerk's office will be demonstrating a couple of web-based tools for electronic filers at the Mississippi Bankruptcy Conference in December. One of the new tools will be a web-based interactive user guide that will be made available on the Court's web site. The on-line user guide for registered electronic filers will provide a wealth of detailed information regarding CM/ECF events and their appropriate usage. Another interactive tool being developed by the Clerk's office is an on-line training course for new electronic filers. Ultimately, the goal of this tool will be to provide on-line training for new electronic filers rather than requiring in-person training at the Clerk's office.

While the two web-based tools referenced above will surely improve effectiveness and efficiency of electronic filing, the Clerk's office is committed to maintaining a productive personal relationship with court users. The Clerk's office conducted a series of three "update" meetings (Jackson, Gulfport, and Hattiesburg) during July 2009 and experienced great attendance and positive feedback from those in attendance. We are committed to conducting these "updates" on an annual basis.

Another successful technological enhancement has been the implementation of video conferencing. Judge Neil P. Olack has utilized video conferencing on a regular basis to conduct hearings between Jackson, Greenville, and Gulfport. Judge Olack issued a standing order in February 2009 establishing guidelines for video conferencing of proceedings held before him. The feedback has been favorable, and we will continue to explore opportunities to leverage video conferencing technology.

Finally, many thanks to our court users for your feedback and suggestions. We sincerely appreciate user input on ways to improve the efficiency and effectiveness given the number of natural constraints under which we all operate. If you have a suggestion, please email us at feedback@mssb.uscourt.gov.

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Recent DECISION BY FIFTH CIRCUIT

Submitted by Mike Bolen

In regards: No. 08-60953 TROY EDWIN TATE; ELAINE BURRIS TATE

In the Matter of: Debtors
TROY EDWIN TATE and ELAINE BURRIS TATE, Appellants
v.
R. MICHAEL BOLEN, United States Trustee, Appellee

Appeal from the United States District Court for the Southern District of Mississippi, Southern Division
USDC No. 1:08 CV 32

Before REAVLEY, DAVIS, and BENAVIDES, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

The debtors, Troy Edwin Tate and Elaine Burris Tate, appeal the order of the district court affirming the judgment of the bankruptcy court dismissing their Chapter 7 bankruptcy case for abuse. To determine if a debtor with above median income has filed a presumptively abusive Chapter 7 case, we must apply the means test under that chapter and decide whether a debtor can claim a transportation ownership deduction when the debtor has no loan or lease payment on his cars. Based on our conclusion that the debtors should have been allowed to deduct the transportation ownership deduction under the plain language of 11 U.S.C. § 707(b), we reverse and remand.

I.

The Tates filed for bankruptcy relief under Chapter 7 of the Bankruptcy Code on January 10, 2007. They reported household income above the applicable state median income level. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) subjects debtors with above median income to a means test to determine if they qualify for Chapter 7 bankruptcy. The purpose of the means test is to determine if the debtors can repay a portion of their debt. Under the means test, if a debtor has sufficient disposable income to pay his unsecured creditors at least $166.67 each month (at least $10,000 over five years), proceedings under Chapter 7, which allows for complete discharge of debt, are considered presumptively abusive. 11 U.S.C. § 707(b)(2)(A)(ii)(I). In that situation, the debtor is usually required to proceed under Chapter 13, which allows for partial repayment of debt.

The means test takes the debtor's current monthly income and reduces it by allowed deductions set forth in 11 U.S.C. § 707(b)(2)(A)(ii)-(iv). At issue in this appeal is the transportation ownership deduction allowed under § 707(b)(2)(A)(ii)(I), which allows the debtor to deduct -

> the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards, and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides, . . . Notwithstanding any other provision of this clause, the monthly expenses of the debtor shall not include any payments for debts.

11 U.S.C. § 707(b)(2)(A)(ii)(I).

The National and Local Standards referenced in the statute are found in the IRS's Financial Analysis Handbook which is in turn found in the IRS's Internal Revenue Manual (IRM). Revenue agents use the IRM to assess the financial condition of delinquent taxpayers to determine what they can afford to satisfy their tax debt to the government. Transportation expenses are part of the Local Standards and are divided into ownership and operating expenses.

In performing the means test, the Tates claimed the IRS Local Standard vehicle ownership allowance for two vehicles in the amounts of $471 and $332, respectively. The Tates also claimed a $343 deduction for vehicle operating expenses for the two cars they own. The Tates owe no money on these cars. Only the ownership expense is at issue in this appeal. With these deductions, the Tates' monthly disposable income under the means test was $137.66. If the Tates are allowed the transportation ownership deduction, their monthly net income falls below $166.67 and their application is not presumptively abusive. If the deduction is not allowed, the presumption of abuse applies.

The Bankruptcy Trustee filed a motion under § 707(b)(2) to dismiss the Tates' case under Chapter 7 for abuse. The motion challenged the vehicle ownership deduction and alleged that the Tates failed the means test when their expenses were properly calculated. The Tates opposed the motion. The bankruptcy court granted the Trustee's motion to dismiss. The Tates appealed. The district court affirmed the bankruptcy court's order. The district court noted that the transportation ownership expense issue had not been resolved in this circuit, but concluded that "the weight of persuasive authority in this Circuit holds that a 'debtor may not deduct the vehicle ownership expense unless the debtor has a monthly note or lease payment on a vehicle.'" The Tates appeal.

II.

The sole issue in this appeal is whether, in conducting the means test under 11 U.S.C. § 707(b), a debtor may claim a vehicle ownership expense for a vehicle that is not encumbered by a debt or a lease. We review this question of statutory interpretation de novo. Walgreen Co. v. Hood, 275 F.3d 475, 477 (5th Cir. 2001).

This issue has been heavily litigated and there is a split among the courts that have addressed the issue. See Ransom v. MBNA Am. Bank, N.A. (*In re Ransom*), 380 B.R. 799, 803-06 (B.A.P. 9th Cir. 2007)(describing the split in authority). Only one circuit court has addressed this issue. As outlined by the Seventh Circuit in *Ross-Tousey v. Neary* (*In re Ross-Tousey*), 549 F.3d 1148 (7th Cir. 2008), the courts have followed two basic approaches to this issue: (1)

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(continued)

the "plain language approach", which allows the vehicle ownership deduction even if the debtors have no monthly payment associated with the vehicle, and (2) the "IRM approach," which does not. *Id*. at 1157. Both approaches start from the text of the statute which states in part, "The debtor's monthly expenses shall be the debtor's **applicable** monthly expense amounts specified under the National Standards and Local Standards." 11 U.S.C. § 707(b)(2)(A)(ii)(I). The approaches differ, however. in how they read the word "applicable" in the above sentence.

Courts following the "plain language" approach read the word "applicable" to refer to the selection of an expense amount from the Local Standards that relates to the geographic area in which the debtor resides and the number of vehicles the debtor owns. *Ross-Tousey*, 549 F.3d at 1157. Under the plain language approach, the vehicle ownership deduction that "applies" to a debtor is the one that corresponds to his geographic region and number of cars, regardless of whether that deduction is an actual expense. *Id*. at 1157-58. Other courts following the plain language approach include *Hildeb v. Kimbro* (*In re Kimbro*), 389 B.R. 518, 532 (B.A.P. 6th Cir. 2008), and *Pearson v. Stewart* (*In re Pearson*), 390 B.R. 706, 714 (B.A.P. 10th Cir. 2008), *vacated as moot*.

Courts following the IRM approach conclude that the vehicle ownership deduction is not allowed if the debtor has no debt payment. These courts reach this result by reading the word "applicable" to modify "monthly expense" amounts so the debtor can deduct this expense if he has a "relevant" ownership expense. *Ross-Tousey*, 549 F.3d at 1157-58. In other words, under this approach, if the debtor has no debt or lease payment related to a vehicle, he cannot take the ownership deduction because it is not applicable or relevant to him. This interpretation is called the IRM approach because the courts following it use the methodology of the IRM as an interpretive guide for applying the means test. *Id*. at 1158. Under this approach, courts look not only to the Local Standards but also to how the IRS uses the Local Standards in its revenue collection process. Under the IRM, if a taxpayer has no car payment, the taxpayer is only entitled to the vehicle operation deduction, not the ownership deduction. *Id*. at 1159. The main cases following the IRM approach are *In re Ransom*, 380 B.R.
799, 808 (B.A.P. 9th Cir. 2007), and *Babin v. Wilson* (*In re Wilson*), 383 B.R. 729, 734 (B.A.P. 8th Cir. 2008).

The Seventh Circuit adopted the plain language approach and rejected the
IRM approach for several reasons. It found the plain language approach "more strongly supported by the language and logic of the statute." *Ross-Tousey*, 549 F.3d at 1158.

> In order to give effect to all the words of the statute, the term "applicable monthly expense amounts" cannot mean the same thing as "actual monthly expenses." Under the statute, a debtor's "actual monthly expenses" are only relevant with regard to the IRS's "Other Necessary Expenses;" they are not relevant to deductions taken under the Local Standards, including the transportation ownership deduction. Since "applicable" cannot be synonymous with "actual," applicable cannot reference what the debtor's actual expense is for a category, as courts favoring the IRM approach would interpret the word. We conclude that the better interpretation of "applicable" is that it references the selection of the debtor's geographic region and number of cars.

Id. The Seventh Circuit also noted two additional arguments in support of the plain language approach. First, section 707(b)(2)(A)(ii)(I) states that "the monthly expenses of the debtor shall not include any payments for debts." It found this language impossible to reconcile with the IRM approach which would only allow the vehicle ownership deduction if the debtor had a monthly debt payment associated with a vehicle. *Id*. *See also Kimbro*, 389 B.R. at 523. Second, when examining the statute more broadly, the court noted that Congress has in other circumstances been clear to state when an actual expense is required before a deduction may be allowed. *Ross-Tousey*, 549 F.3d at 1158.

> For example, section 707(b)(2)(A)(ii) uses the following phrases to describe the nature of various other deductions: "debtor's reasonably necessary expenses incurred," § 707(b)(2)(A)(ii)(I) (Family Violence Prevention and Services Act expenses); "expenses paid by the debtor that are reasonable and necessary," § 707(b)(2)(A)(ii)(II) (expenses for elderly, chronically ill or disabled immediate family members); . . . and "actual expenses [that are] are reasonable and necessary," § 707(b)(2)(A)(ii)(V) (additional home energy costs).

Id. (emphasis added). The absence of similar language with regard to the Local Standards suggests that the statute does not require an actual expense and the courts should not imply such a requirement. *Id*.

Rejecting the IRM approach, the court found that although the IRM provides a useful methodology for IRS agents for determining a taxpayer's ability to pay, there is no indication that Congress intended that methodology to be applied to the means test. Id. at 1159. Section 707(b)(2)(A)(ii)(I) refers
only to "amounts specified" in the Local Standards. It does not incorporate the IRM or the Financial Analysis Handbook into the statute or even refer to them. *Id*. We agree with the Seventh Circuit that the legislative history of §707(b)(2)(A)(ii)(I) confirms that the provision's silence with regard to the IRM and IRS methodology was deliberate. A prior version of the BAPCPA which was not passed specifically referred to the Local Standards "as determined under

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the Internal Revenue Service financial analysis." The quoted language did not make it into the final bill. *Id*.

In addition, the Seventh Circuit cited practical reasons why it is inappropriate to adopt the IRM into the means test. The rules in the IRM (which do require a debt to deduct an ownership expense) should not be adopted into the means test because a revenue officer applying the IRM has substantial discretion in how to apply the rules. As explained in *Kimbro*:

> Congress intended that there be uniform and readily-applied formula for determining when the bankruptcy court should presume that a debtor's chapter 7 petition is an abuse and for determining an above-median debtor's disposable income in chapter 13. By explicitly referring to the National and Local Standards, Congress incorporated a table of standard expenses that could be easily and uniformly applied; Congress intended that the court and parties simply utilize the expense amount from the applicable column based on the debtor's income, family size, number of cars and locale. The amounts are entered into the means test form and a determination of disposable income is accomplished without judicial discretion. The clear policies behind the means test were the uniform application of a brightline test that eliminates judicial discretion. Plainly, Congress determined that these policies were more important than accuracy.
>
> However, if the IRM were used to determine the amounts of expenses . . . the means test would of necessity again be a highly discretionary test, because under the IRM, a revenue officer is afforded significant discretion in determining a taxpayer's ability to pay a tax.

Id. at 1160 (citing *Kimbro*, 389 B.R. at 527-28).

Finally, the Seventh Circuit concluded that policy considerations supported their interpretation because costs are associated with vehicle ownership even when no lease or loan payments are due. *Id*. at 1160-61. Citing *In re Clark*, 2008 Bankr. LEXIS 427 (Bankr. E.D. Wis. Feb. 14, 2008), and Eugene Wedoff, *Means Testing in the New 707(b),* 79 Am. Bank. L.J. 231, 257 (2005), the court observed the well known fact debtors with no car payments may nonetheless need replacement transportation during the bankruptcy proceedings. Also, disallowing the deduction has arbitrary results, punishing a debtor who completes paying for their car before filing for bankruptcy and rewarding those who make purchases closer to the time of filing. *Ross-Tousey*, 549 F.3d at 1160.

Based on our review of the statute and the case law interpreting it, we conclude that the plain language approach as set forth by the Seventh Circuit provides the best reading of § 707(b)(2)(A)(ii)(I). Therefore, we adopt that approach and reverse the judgment of the district court.

IV.

For the foregoing reasons, we reverse the judgment of the district court and remand for further proceedings consistent with this opinion.

REVERSED and **REMANDED**.

New Reaffirmation Cover Sheet Form

To implement the requirements of Bankruptcy Rule 4008(b), new Official Form B27, entitled "Reaffirmation Agreement Cover Sheet", has been created and will be required as of December 1, 2009. The form provides for a disclosure of any differences between the income and expenses reported on schedules I and J and the income and expenses reported in the debtor's statement in support of the reaffirmation agreement (i.e., Part D of the Reaffirmation Agreement form) together with an opportunity to explain any such difference. The form also gathers certain financial information, including information necessary for the court to determine whether a reaffirmation agreement creates a presumption of undue hardship under §524(m) of the Code, and it allows the debtor to provide additional information that may rebut such a presumption. The new form may be viewed and obtained by clicking on "Pending Changes" at www.uscourts.gov/bkforms.

Times They Are a'Changing

Changes to Bankruptcy Rule 9006, as well as changes to similar appellate, civil, and criminal rules which address the method in which time is calculated in federal courts, will become effective on December 1, 2009. Under the current bankruptcy rule, intermediate weekends and holidays are excluded when calculating time periods fewer than eight days. Amended Rule 9006 counts intermediate weekends and holidays for all periods. In addition, time deadlines in the current Code, Rules and Forms were reviewed and deadlines of less than 30 days were changed to multiples of seven days so that the expiration of the deadline ordinarily would occur on a weekday. Under the new system: 5-day deadlines become 7 days, 10-and 15-day deadlines become 14 days, 20-day deadlines become 21 days , and 25-day deadlines become 28 days. The number of days in 39 Bankruptcy Rules, 9 Bankruptcy Code statutes and 6 Official Forms has been changed. Detailed information about the changes to the time computation rules can be found at www.uscourts.gov/rules.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI DELTA DIVISION

R. MICHAEL BOLEN,
UNITED STATES TRUSTEE
APPELLANT/PLAINTIFF
v.
CASE NO.: 2:08CV170-SA
NICK O. ADAMS
APPELLEE/DEFENDANT

MEMORANDUM OPINION

This matter comes before the court as an appeal taken by the United States Bankruptcy Trustee ("UST" or "Trustee"). The Trustee appeals the Order of the United States Bankruptcy Court for the Northern District of Mississippi, entered May 4, 2007, which denied the UST's Motion to Dismiss. This Court's jurisdiction is predicated on the authority to hear such appeals as provided by 28 U.S.C. § 158.[1] Having reviewed the briefs of counsel, the relevant legal authorities and exhibits, the record, and the Order of the Bankruptcy Court, this Court makes the following findings:

Factual and Procedural Background

Nick Adams filed his Petition pursuant to Chapter 7 on June 26, 2006, in the United States Bankruptcy Court for the Northern District of Mississippi. He subsequently filed his Statement of Current Monthly Income and Means Test Calculation, which included a deduction for his 401(k) loan obligation. On November 20, 2006, the Trustee filed a Motion to Dismiss Adams' Petition on the grounds that his 401(k) loan obligation was improperly deducted as an allowable expense; thus, he failed the Means Test, and a presumption of abuse arose as a matter of law under 11 U.S.C. § 707(b)(2).

On May 4, 2007, the Bankruptcy Court entered an Order denying the Trustee's Motion to Dismiss. The Order stated in pertinent part: "the Debtor may list his 401K loan obligation on Line 42 of the Chapter 7 Means Test as a secured claim."

From this Order, the UST perfected an appeal to this Court. The following issue is assigned for review: whether the Bankruptcy Judge erred in ruling that Adams' 401(k) loan obligation is a secured claim.

The Trustee argues that the obligation to repay a 401(k) loan is not a debt within the plain meaning of the Bankruptcy Code, or alternatively, a 401(k) obligation is not "secured" under the Bankruptcy Code.

Standard of Review

"In a bankruptcy appeal, the applicable standard of review by a district court is the same as when the Court of Appeals reviews a district court proceeding. Findings of fact by the bankruptcy courts are to be reviewed under the clearly erroneous standard and conclusions of law are reviewed de novo." *In re Chesnut*, 422 F.3d 298, 301 (5th Cir. 2005); *In re Evert*, 342 F.3d 358, 363 (5th Cir. 2003) (citing Matter of Midland Indus. Service Corp., 35 F.3d 164, 165 (5th Cir. 1994)); *In re Pequeno*, 126 Fed. Appx. 158, 162 (5th Cir. 2005); *In re Salter*, 251 B.R. 689, 692 (S.D. Miss. 2000). The standard of review for a mixed question of law and fact is abuse of discretion. Eisen v. Thompson, 370 B.R. 762, 767 (S.D. Ohio 2007). Abuse of discretion is defined as a definite and firm conviction that the [court below] committed a clear error of judgment. The question is not how the reviewing court would have ruled, but rather whether a reasonable person could agree with the bankruptcy court's decision; if reasonable persons could differ as to the issue, then there is no abuse of discretion.

In re Eagle-Picher Indus., 285 F.3d 522, 529 (6th Cir. 2002).

Discussion and Analysis

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") was signed into law on April 20, 2005. The 2005 Act amended, among other things, 11 U.S.C. Section 707(b) of the Bankruptcy Code. Prior to the 2005 amendments, Section 707(b) contained a presumption "in favor of granting the relief requested by the debtor," regardless of the debtor's assets, income, debts, or ability to pay some or all of his debts. *In re Cortez*, 457 F.3d 448, 455 (5th Cir. 2006). This presumption could only be overcome if, upon a motion of the bankruptcy court or United States Trustee, the court determined that "granting the relief requested would be a substantial abuse" of Chapter 7. *Id*. at 454. The 2005 Act eliminated both the presumption in favor of granting the requested relief, and the requirement that "substantial" abuse be shown to dismiss a Chapter 7 filing. *In re Sorrell*, 359 B.R. 167, 178-79 (S.D. Ohio 2007). A debtor requesting Chapter 7 relief now faces "a burden-filled application process, containing, depending upon the information provided, and subject to challenge from an expanded number of entities granted standing to bring such actions, a presumption against the relief available in a Chapter 7 case." *Id*.

After the BAPCPA, every debtor who owes primarily consumer debts in a Chapter 7 case is required to file, in conjunction with bankruptcy schedules and a statement of financial affairs, a Statement of Current MonthlyIncome and Means Test Calculation, Official Form 22A ("Means Test Form"). 11 U.S.C. §§ 521, 707(b)(2)(C). This is the official form approved by the Judicial Conference of the United States to perform the § 707(b) means test. The ultimate result of the means test is a calculation of the debtor's monthly disposable income, which is used to screen Chapter 7 petitions for abuse. If

[1]28 U.S.C. § 158(a) states in part that: [t]he district courts of the United States shall have jurisdiction to hear appeals (1) from final judgments, orders, and decrees; (2) from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and (3) with leave of the court, from other interlocutory orders and decrees; and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

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the debtor's monthly disposable income is less than $100 ($6,000.00 over 60 months), the presumption of abuse does not arise. If the monthly disposable income is equal to or exceeds $166.67 ($10,000.00 over 60 months), the presumption of abuse arises. If the monthly disposable income is between $100 and $166.67, the presumption of abuse arises if that amount, over 60 months, is sufficient to pay at least twenty-five percent of the debtor's nonpriority unsecured debt. 11 U.S.C. § 707(b)(2)(A)(i).

If the presumption of abuse arises, a court, on its own motion or on the motion of a United States Trustee or other party in interest, may dismiss a Chapter 7 case filed by an individual debtor whose debts are primarily unsecured consumer debts. 11 U.S.C. § 707(b)(1). A filing under Chapter 7 in which the presumption of abuse arises can, with the debtor's consent, be converted to a filing under Chapters 11 or 13 of the Bankruptcy Code. *Id*.

At issue in this case is whether Adams' $381.80 monthlypayment excised from his paycheck by his employer for the 401(k) loan obligation qualifies as a secured claim or a debt such that it may be deducted from his disposable monthly income. If this court holds that it is a secured claim, Adams' Current Monthly Income does not cross the threshold of abuse; if the court holds it is not a secured claim, Adams' Current Monthly Income may fall within the purview of abuse. Thus, the debtor's ability to deduct the monthly loan payment determines whether the presumption of abuse applies here.

The Bankruptcy Code defines "debt" as a "liability on a claim," and defines "claim" as a "right to payment." 11 U.S.C. § 101(12), (5). Thus, the terms "debt" and "claim" are considered to be "coextensive" under the Code. *McVay v. Otero*, 371 B.R. 190, 195 (W.D. Tex. 2007); *In re Mordis*, 2007 Bankr. LEXIS 3527, 2007 WL 2962903 at *3 (Bankr. E.D. Mo. Oct. 9, 2007). A loan from a retirement plan constitutes a "debt" only if the retirement plan administrator has a "claim" for repayment. Id. "The vast majority of courts that have addressed the issue [both pre-and post-BAPCPA] have held that a debtor's obligation to repay a loan from a qualified retirement plan is not a 'debt' under the Code." *In re Mordis*, 2007 Bankr. LEXIS 3527, 2007 WL 2962903 at *3 (citing *Mullen v. United States*, 696 F.2d 470, 472 (6th Cir. 1983); *In re Villarie*, 648 F.2d 810, 811 (2nd Cir. 1981); *Eisen*, 370 B.R. at 769-70; *McVay*, 371 B.R. at 196-97; *In re Jones*, 335 B.R. 203, 210 (Bankr. N.D. Fla. 2005); *In re Esquivel*, 239 B.R. 146, 151 (Bankr. E.D. Mich. 1999); *In re Scott*, 142 B.R. 126, 131-32 (Bankr. E.D. Va. 1992)). *See also McVay*, 371 B.R. at 195 ("There is a clear consensus that an individual's pre-petition borrowing from his retirement account does not give rise to a secured or unsecured 'claim,' or a 'debt' under the Bankruptcy Code.") (citation omitted).

"When a person defaults on a loan taken from a qualified retirement plan, the plan administrator usually offsets the unpaid balance of the loan from the person's account." *In re Mowris*, 384 B.R. 235, 238 (Bankr. W.D. Mo. 2008). Consequently, the plan administrator does not have a "right to payment" from the account holder if he defaults on the loan. *McVay*, 371 B.R. at 198. In effect, the Debtors have borrowed their own money, such that, in the event they fail to repay the loans, then they have simply taken an advance on their retirement benefits. *Id*. Since such a loan is not a "debt" under the Code in the first place, payments on them cannot be "payments on account of secured debts," for the means test calculation under § 707(b)(2)(A)(iii). *Id*. at 210 ("Given the Court's determination that the [Debtors'] [retirement] loans were not 'debts' under the Code, the loans necessarily could not be 'secured debts,' and the repayment of such debts could not be 'payments on account of secured debts' for the purposes of § 707(b)(2)(A)(iii).").

After reading the briefs submitted and holding a hearing on the motion, the BankruptcyCourt specifically found that the "Debtor may list his 401K loan obligation on Line 42[2] of the chapter 7 Means Test as a secured claim." The Bankruptcy Court apparently interpreted Adams' loan against his retirement account not as one from his retirement account, but as one using that account as collateral. Moreover, the Bankruptcy Court found his 401(k) loan obligation to be a secured claim. Therefore, this Court finds the Bankruptcy Court's interpretation of this matter to be a mixed finding of law and fact and therefore reviewable under the abuse of discretion standard.

According to the Loan Note and Security Agreement, Nick Adams borrowed the sum of $17,000 from the Railworks Corporation Incentive Plan and granted to the Plan Administrator a security interest worth $17,000 in the vested amount of his retirement account balance. Specifically, the agreement notes that Adams is "giving [the plan administrator] a security interest in that portion of [his] vested account in the Plan ("the Collateral") equal to the loan amount, which amount does not exceed 50% of [his] vested account balance under the Plan." Under the Acceleration; Default section, the document states:

> Upon any default, the Secured Party shall have the option, to the extent allowable by law and in addition to all other remedies available to such Secured Party by law, to make entry in my loan account in the Plan, indicating such loan is being paid off and that the Collateral will be reduced by the amount of the unpaid principal balance and all interest owing thereon.

(Emphasis added). Also included in the loan documents is a Truth-in-Lending Disclosure Statement and notice that weekly deductions will be taken from Adams' paycheck to repay the debt.

[2]Line 42 governs "Future payment of secure claims."

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It appears here, that the Bankruptcy Court interpreted Adams' Loan with his plan administrator as one in which the administrator could seek recourse from Adams personally instead of, or in addition to, offsetting any debt against his vested account due to the language highlighted above. Although the Court can only speculate due to the lack of written opinion, this may have been the Bankruptcy Court's reason for denying the UST's motion to dismiss even though the case law is overwhelmingly against allowing a 401(k) loan repayment deduction to be included as a secured claim under the means test.

The Second Circuit addressed this similar issue in *In re Villarie*, 648 F.2d 810 (2nd Cir. 1981). Under that decision, the appellate court held that if the plan administrator's source of repayment in the event of a default is to offset the unpaid balance from the debtor's future benefits, the administrator has no right to repayment from the debtor, and the loan does not constitute a "debt" under the Bankruptcy Code. *Id*. at 812. In particular, the loan documents did not give the plan administrator the right to sue a member for the amount of the advance and specifically stated that the amount of the disbursement could not exceed fifty percent of the employee's previous contributions to the fund. *Id*. at 811. The court considered the sources to which the administrator could turn for repayment of the unpaid loan and found that because there was no other right to recourse other than offset from the retirement account, the obligation lacked the core characteristic of a "debt" --the creditor's enforceable "right to repayment." *Id*. at 812.

In *McVay*, the district court for the Western District of Texas reversed the Bankruptcy Court's denial of the UST's motion to dismiss for abuse. On their Statement of Current Monthly Income and Means Test Calculation, the Debtors listed at line 42 a deduction for the repayment of two loans they received from the administrator of their retirement plans. The Debtors attempted to distinguish their retirement loan from the loan at issue in *In re Villarie* by noting that the plan administrator was not forbidden to sue by the loan contract or by the employee handbook. 371 B.R. at 198. However, the district court noted that "the sole remedy provided for in the loan agreement is the ability to deduct the loans' unpaid balance from future plan benefits that will otherwise be paid to the [Debtors]." *Id*. Thus, the court defined these parameters:

> A debtor whose borrowing is limited to his prior contributions is in essence borrowing his own money. But a debtor who borrows beyond that amount is effectively borrowing from other, plan participants, and the plan administrator in such a scenario will generally have a right to recover the unpaid balance. Only the latter scenario gives rise to a "debt."

Id. (citing *In re Scott*, 142 B.R. at 133).

In *In re Smith*, a bankruptcy court noted that although a retirement loan was set up as a secured loan complete with a Truth-in-Lending Statement and collateral pledge of fifty percent of the value of the vested retirement account, the "form of the documentation cannot get around the substance of the transaction, that [the Debtor] borrowed his own money. 388 B.R. 885, 887 (Bankr. C.D. Ill. 2008). That court analyzed the issue as follows:

> [A] retirement plan borrower has the right not to repay the loan. Nonpayment comes with liability for income taxes and penalties, but nonpayment is a valid, lawful alternative. As such, [the Debtor's] retirement plan trustee or administrator has no claim against [the Debtor] or the bankruptcy estate. Without a claim, a 401(k) plan loan is not a "debt" for bankruptcy purposes. With no debt, the loans are not "secured debts" and cannot be deducted under Section 707(b)(2)(A)(iii).

Id. at 887-88 (citation omitted).

After reviewing the case law and thoroughly studying the Bankruptcy Code and arguments made, this Court is of the opinion that Adams' retirement loan obligation is not a secured claim and should not be deducted under Line 42 of Form 22A. Specifically, the Court finds persuasive the holding and reasoning of *McVay v. Otero*, 371 B.R. 190 (W.D. Tex. 2007), a case handed down six days prior to the Bankruptcy Court's Order. Thus, the Court finds that Adams' 401(k) loan obligation does not constitute a debt under Section 707(b) as he is effectively borrowing money from himself with the right not to repay the loan.

The UST alternatively argues that Adams' 401(k) loan obligation is not secured either. Section 506(a)(1) provides the definition for a secured claim: "An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in such property." This Court is not persuaded that Adams' 401(k) loan obligation is a secured claim.

Section 541(b)(7) of the Bankruptcy Code explicitly excludes as property of the bankruptcy estate "any amount . . . withheld by an employer from the wages of employees for payment as contributions to an employee benefit plan subject to . . . the Employee Retirement Income Security Act of 1974" or "received by an employer from employees for payment as contributions to an employee benefit plan" that is subject to ERISA. Thus, the retirement plan assets are specifically excluded under the Bankruptcy Code from a bankruptcy estate. See *In re Moore*, 907 F.2d 1476 (4th Cir. 1990).

Adams, however, argues that under Section 553, he is entitled to a setoff, thus qualifying his loan obligation as secured under 506(a)(1). *See* 11 U.S.C. § 506(a)(1) ("An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI DELTA DIVISION

this title, is a secured claim . . .."). In order to exercise a right of setoff under section 553, there are four conditions that must exist: (1) the creditor must hold a "claim" against the debtor that arose before the commencement of the case; (2) the creditor must owe a "debt" to the debtor that also arouse before the commencement of the case; (3) the claim and debt must be "mutual"; and (4) the claim and debt each must be valid and enforceable. *In re Carolina Acoustical and Flooring, Inc*., 2008 Bankr. LEXIS 1808, *6-7, 2008 WL 2369599, *2 (Bankr. M.D. N.C. June 10, 2008). As the Court has held above that the 401(k) loan obligation did not qualify as a "debt" under the Bankruptcy Code, Adams has no right to a setoff under Section 553. *See* 11 U.S.C. § 553.

Conclusion

Adams' loan note allows the plan administrator to make entry into his 401(k) retirement account in the event of default. The Court concludes that regardless of the loan language providing for recourse "in addition to all other remedies available . . . by law," nonpayment is a valid option for the Debtor. Thus, the obligation lacks the core characteristic of a "debt" --the creditor's enforceable "right to repayment" against the Debtor --and cannot be included on Line 42 of the Statement of Current Monthly Income and Means Test Calculation. Accordingly, the Bankruptcy Court's Order denying the UST's Motion to Dismiss is REVERSED, and this case is hereby REMANDED to the Bankruptcy Court for further proceedings in line with this opinion and 11
U.S.C. § 707(b)(2).

SO ORDERED, this the 5th day of March, 2009.

/s/ Sharion Aycock
U.S. DISTRICT JUDGE

Selected Opinions by JUDGE EDWARD ELLINGTON

Submitted by Mimi Speyerer, Law Clerk

McCOY vs. MISSISSIPPI STATE TAX COMMISSION (IN RE McCOY);

Case No. 07-2998EE; Adv. No. 08-175; Chapter 7; August 31, 2009.
§§ 523(a)(1), 507(a)(8).
Miss. Code §§ 27-7-31 & 27-7-41.

FACTS: Debtor filed bankruptcy and received a Chapter 7 discharge. She later reopened her case in order to file a complaint seeking to have her debt to the State of Mississippi for pre-petition income taxes (years 1998 & 1999) declared discharged. The MSTC filed a motion to dismiss the complaint on the grounds that the adversary proceeding violated the 11th Amendment. In the alternative, the MSTC argued that the taxes are nondischargeable pursuant to § 523(a).

HOLDING: The Court first addressed the question of the MSTC's sovereign immunity defense. The Court found the proceeding at issue before it was a purely in rem proceeding. The Court further found that based upon the U. S. Supreme Court's decision in *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006) and *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004), a proceeding to obtain the discharge of a debt in bankruptcy is not barred by the 11th Amendment.

The Court found that "(i)n general, tax claims that are nondischargeable but lack priority are those that the debtor contributed in some way to their staleness by his own wrongdoing by, for example, failing to file tax returns, filing them late, or filing fraudulent returns." The MSTC did not assert that the taxes were entitled to a priority status. Instead the MSTC asserted that the taxes were nondischargeable because the Debtor's returns were not "returns" within the meaning of the statute–they were not filed or given to the MSTC, therefore, they are nondischargeable pursuant to § 523(a)(1).

Under BAPCPA, a "hanging paragraph" was added to § 523. This hanging paragraph added a definition for *return* (which basically adopted pre-BAPCPA case law). The new definition of return under § 523(a)(*) requires that a return meet the filing requirements of nonbankruptcy law.

Applying Mississippi law and Judge Houston's opinion in *Creekmore v. IRS (In re Creekmore)*, 401 B.R. 748 (Bankr. N.D. Miss. 2008), the Court found that the Debtor's returns did not fall within BAPCPA's definition of a return under § 523(a)(*), and for that reason, the taxes she owed for those years are nondischargeable under § 523(a)(1)(B)(I).

NOTE: The Debtor has appealed this decision.

LIQUIDATING TRUSTEE FOR THE CONSOLIDATED FGH LIQUIDAING TRUST vs. SOUTHERN INSPECTION SERVICES, INC.
(IN RE FRIEDE GOLDMAN HALTER, INC.);

Case No. 01-52173EE; Adversary No. 03-5088; Chapter 11; April 1, 2009.
§§ 547(b) and 550(a).
Fed. R. Evid. 802 & 803.

Selected Opinions by JUDGE EDWARD ELLINGTON (continued)

Fed. R. Civ. P. 56(e)

FACTS: An adversary was filed alleging that Southern Inspection Services, Inc. (SIS) had received preferential transfers that were avoidable and recoverable pursuant to § 547(b) and § 550(a). SIS alleges that the transfers were not avoidable transfers because they were contemporaneous exchanges for new value; were made in the ordinary course of business; did not enable SIS to receive more than it would in a Ch. 7; and that SIS provided new value. SIS filed a motion for partial summary judgment and attached the affidavit of the current president of SIS. The affidavit sets out the delivery date of checks and invoices, however, no exhibits were attached to the affidavit.

In its answer, the Liquidating Trustee conceded that one check was outside the preference period and that is was not recoverable. As to the remaining payments, the Liquidating Trustee asserts that material facts existed and that the affidavit was inadmissible hearsay pursuant to Rules 802 & 803 of the Federal Rules of Evidence and that the affidavit lacked documentation to support it as required by Fed. Rule Civ. P 56(e).

HOLDING: The Court granted summary judgment as to the transfer the Liquidating Trustee conceded was outside of the prefeSSelcetedSeclected Opinionsrence period.

The Court then found that Rule 56(e) requires documentary evidence to be attached to an affidavit if the documentary evidence is cited as a source of factual contention. In the case at bar, the affidavit did not have any checks, invoices or other documentation attached to support the information contained therein nor did the affidavit give any proof or information to indicate that the current president of SIS was the president of SIS at or near the time the that transactions with the Debtor occurred. Therefore, the Court found that the affidavit did not comply with Rule 56(e) and could not be considered. Consequently, the Court denied summary judgment because SIS had not met its burden to prove a § 547(c)(4) defense and had not established the absence of a genuine issue of material fact regarding the § 547(c)(4)

Opinion Summaries by JUDGE NEIL P. OLACK

Prepared by Carole Evans, Laura Glaze, and Rachael Lenoir with the assistance of Neill Bryant and Nick Crawford, Judicial Externs, Mississippi College School of Law

Russell v. Queen City Furniture (*In re: Russell*), 402 B.R. 188 (Bankr. N.D. Miss. 2009)

Issued: January 23, 2009

Debtor purchased furniture by executing an installment contract containing an arbitration clause and subsequently filed for chapter 13. The Debtor alleged that when Creditor filed its proof of claim, it neglected to redact Debtor's personal information, prompting this adversary proceeding. In its decision, the Court applied a two-part test to determine whether to compel arbitration. In applying this test, the Court asked (1) whether Debtor agreed to arbitration and (2) whether the claims were arbitrable. After finding that Debtor agreed to arbitration by signing the installment contract, the Court held that the thrust of Debtor's complaint arose only in a bankruptcy context and arbitration of this matter would conflict with the purposes of the Bankruptcy Code. For these reasons, the Court denied Creditor's motion to stay proceedings and compel arbitration.

In re Katon, Inc., 2009 WL 982559 (S.D. Miss. 2009)

Issued: March 6, 2009

Debtor filed for chapter 11 relief. Creditor filed a motion to dismiss or convert, and Debtor responded. Applying the two-prong test of Section 1112(b)(4), the Court found both a substantial diminution to the estate because Debtor was operating at a net loss and an absence of a reasonable likelihood of rehabilitation. Accordingly, the Court granted Creditor's motion and converted the case to a chapter 7.

In re: Premier Entertainment Biloxi, LLC, 2009 WL 1230795 (S.D. Miss. 2009)

Issued: April 29, 2009

Debtors entered into a lease agreement for a parcel of land containing a liquidated damages clause in the event of a default. Debtors objected to the proof of claim, asserting that Creditor's claim should be disallowed or limited pursuant to §§ 502(b)(1) and (6). Creditor argued that the liquidated damages clause in the lease was enforceable because the liquidated damages were not "rent reserved." The Court held the matter was governed by § 502(b), and the liquidated damages clause was unenforceable. Accordingly, the Court disallowed Creditor's claim.

Opinion Summaries by JUDGE NEIL P. OLACK
(continued)

In re: Cuevas, 2009 WL 1515041 (Bankr. S.D. Miss. 2009)
Issued: May 28, 2009
Debtors proposed a 38% distribution over sixty months to unsecured creditors in their chapter 13 plan. The Trustee objected and requested that the plan be denied based on Debtor's failure to satisfy the good faith test in § 1325(a)(3) and the liquidation test under 1325(a)(4). The Court found that Debtors had violated the good faith test through numerous transfers of property without consideration to their children in the three months prior to filing their petition, material omissions in their financial statements and inconsistent testimony. The Court also found that Debtors' plan failed to pass the liquidation test under § 1325(a)(4) because the plan did not provide at least as much value to unsecured creditors as they would have received in a chapter 7 liquidation. For these reasons, the Court sustained the Trustee's objection to confirmation and denied confirmation of Debtors' plan.

In re: Coastal Land Development Corp., 2009 WL 1515050 (Bankr. S.D. Miss. 2009)
Issued: May 29, 2009
Debtor filed chapter 11 and a subsequent motion to sell property and to approve an asset purchase agreement with Creditor who had paid funds to purchase the property at a defective prepetition foreclosure sale and had been unable to obtain reimbursement from the lienholder. An objection to the motion to sell was filed by a party claiming to have an interest in a portion of the property. Debtor and Creditor filed a joint motion for sanctions against the Objector asserting improper purposes in filing the objection. The sale was approved and the sanctions issue heard separately. Although the Objector asserted creditor status and an ownership interest in the property, he was unable to prove either at the hearing. The Court found that the objection was filed for improper purposes based upon the Objector's previous attempts to negotiate sales of the property in his real estate business. The Court concluded that the objection was not warranted by existing law, was not factually supported by evidence, and improperly delayed proceedings. Sanctions were awarded for the reasonable attorney's fees and expenses of Creditor pursuant to Rule 9011, §105 and the Court's inherent power.

In re: Hyperion Foundation, Inc., 08-51288-NPO (Bankr. S.D. Miss. 2009)
Issued: June 18, 2009
Debtor filed motion to eliminate appointment of patient care ombudsman ("PCO") under § 333. Trustee and landlord/creditor challenged the quality of patient care provided by Debtor to its nursing home residents in absence of PCO. In support of their contention, they pointed to deficiency citations issued by the Mississippi Department of Health ("MDH"). The Court found the appointment of a PCO an unnecessary expense, given the MDH's determination that the Debtor had complied with all safety requirements after its re-survey of the Debtor's facilities. However, the Court did not foreclose the possibility of revisiting the issue should the need arise.

In re: Kevin Coleman and Kevin Coleman Construction, Inc. Consolidated
Case No. 07-00515-NPO
Issued: July 2, 2009
On motion for summary judgment, the Court overruled a Debtor's objection to a proof of claim filed by the IRS for unpaid individual income taxes arising out of dividend income the Debtor incorrectly reported as loans from his solely-owned construction company. The Debtor insisted that he and his construction company never existed separately and that it would be unfair to allow the IRS to tax the same funds twice, i.e., once as corporate income and again as dividend income. The Court found that because the construction company was organized for a business purpose and had engaged in business activities, it was a separate and distinct entity from the Debtor for tax purposes under the principles established by the United States Supreme Court in Moline Properties, Inc. v. Commissioner, 319 U.S. 436 (1943). Moreover, the substantive consolidation of the bankruptcy cases of the Debtor and his construction company did not change this result.

In re: Grinstead, 2009 WL 2499610 (Bankr. S.D. Miss. 2009)
Issued: August 14, 2009
Debtor and Creditor entered an agreed order terminating stay with respect to Creditor's first lien on Debtor's property after which the chapter 7 case was closed. Debtor subsequently filed a voluntary chapter 13 petition the day before the foreclosure sale. The Creditor proceeded with the sale but moved for an order upholding the order terminating the stay prior to filing the substituted trustee's deed. Debtor alleged that the foreclosure sale violated § 1301 and § 1322. The Court held that the foreclosure

Opinion Summaries by JUDGE NEIL P. OLACK (continued)

sale did not violate the co-debtor stay because Debtor's husband was not a co-debtor, having neither signed the note nor secured the debt. Further, the Court held that § 1322 was inapplicable because Creditor had been granted relief from the stay in the previous case, and the present petition had no effect on Creditor. Accordingly, the Court granted Creditor's motion and upheld the order lifting the automatic stay as to Creditor.

In re: Beasley, 2009 WL 2579104 (S.D. Miss. 2009)
Issued: August 20, 2009
Creditor was given a lien on Debtor's property as evidenced by a deed of trust. Debtor defaulted on his payments, and Creditor foreclosed on the property. Debtor contested, arguing that the notice of the foreclosure sale was improper since Debtor was under a conservatorship. The Court found that Creditor gave proper notice of foreclosure sale pursuant to statutory notice requirements and the terms of the deed of trust. Accordingly, the Court granted Creditor's motion for relief from the automatic stay in order to allow Creditor to proceed with its dispossessory action in state court.

In re: Phillips, 2009 WL 2835212 (S.D. Miss. 2009)
Issued: August 28, 2009
Debtors filed a voluntary chapter 7 petition. Subsequently, Creditor filed its complaint to determine the dischargeability of a debt. Debtors filed their answer and counterclaim alleging negligence, fraud, and breach of fiduciary duty in causing Debtors to be arrested in connection with state court litigation in Louisiana. In considering the Creditor's motion for summary judgment, the Court found that the claims contained in Debtors' counterclaim arose prior to the petition for relief. Thus, these claims were property of the estate. Accordingly, Debtors lacked standing to pursue their counterclaim, and the Court granted Creditor's motion for summary judgment.

In re: Coastal Land Development Corp., 2009 WL 2985700 (Bankr. S.D. Miss. 2009)
Issued: September 15, 2009
The Court determined that Respondent violated Federal Rule of Bankruptcy Procedure 9011(b) in the filing of his objection to Debtor's motion to sell property and approve an asset purchase agreement with Movant. Sanctions for attorney's fees and expenses were awarded to Movant, but were never paid by Respondent. At hearing on Movant's motion, Respondent testified that he was destitute and unable to pay the sanctions. While the Court found that Movant had established a prima facie case for contempt, Respondent had likewise established his present inability to comply with the Judgment. Accordingly, the Court denied Movant's motion to show cause why Respondent should not be held in contempt.

Couple Pleads Guilty to Mail Fraud, Bankruptcy, Fraud and Falsifying Documents in Bankruptcy Cases

Jackson, Mississippi - Acting U.S. Attorney Stan Harris, U.S. Trustee R. Michael Bolen, and FBI Special Agent in Charge Frederick T. Brink announced that Robert E. Power, Jr. pled guilty in U.S. District Court today to conspiracy to commit bank and wire fraud, and bankruptcy fraud. Deaundrea Power pled guilty to misprision of a felony for failing to report bankruptcy fraud committed by Robert E. Power, Jr.
Robert E. Power, Jr. and his wife, Deaundrea Power, doing business as Yorkshire Financial Services, targeted homeowners at risk of foreclosure, representing to the homeowners that in exchange for transfer of their property to Yorkshire and a monthly rental payment, Yorkshire would negotiate mortgages or refinance mortgages to allow the homeowner to remain in their home. The Powers would then place the property in bankruptcy unbeknownst to the homeowners and either the home would eventually be foreclosed upon, or sold through straw buyers, via fraudulent loans where the Powers would obtain cash money from the sale. As a result of the Powers' actions, the homeowners lost their homes while the Powers gained a profit from the fraudulent activity.
The Powers are scheduled to be sentenced on November 5, 2009 at 9:00 before U.S. District Judge Tom S. Lee. Robert Power faces a maximum penalty of 10 years in prison and a $250,000 fine, while Deaundrea Power faces up to 3 years in prison and a $250,000 fine.

Indictment in Baton Rouge, Louisiana, on Charges of Bankruptcy Fraud

United States Attorney David R. Dugas announced that a federal grand jury returned an indictment on May 13, 2009, charging **Lee M. Allen**, age 66, and **Sandra Sue Allen**, age 62, both residents of Zachary, Louisiana, with bankruptcy fraud in connection with their bankruptcy case filed in June 2005.

The eight count indictment alleges that the two women posed as a married husband and wife, both on their bankruptcy petition filings and schedules, and under oath in a proceeding conducted before a bankruptcy trustee in August 2005. The indictment further alleges the two women concealed from creditors and the bankruptcy estate over $18,000 worth of jewelry and over $138,000 which Sandra Sue Allen received from her mother who had died in March 2005. The alleged scheme involved converting proceeds which Sandra Sue received from the sale of her mother's home in Chicago into a series of bank cashier checks during the existence of the bankruptcy estate. The checks were then used to purchase land in Zachary and two mobile homes that were placed on the land. None of the transactions were disclosed in the bankruptcy proceedings. Public records associated with both the purchase of the land and attaching the mobile homes to the land indicated the two defendants were unmarried women.

If convicted of all counts, Sandra Sue Allen could receive a maximum sentence of forty years imprisonment and a $2 million fine, while Lee M. Allen could receive a maximum sentence of thirty years imprisonment and a $1.5 million fine.

The case was investigated by the Federal Bureau of Investigation; the Office of the United States Trustee in Bankruptcy, Fifth District, headquartered in New Orleans; and Assistant U.S. Attorney Ian F. Hipwell.

***Note: An indictment is a determination by a grand jury that there is probable cause to believe that offenses have been committed by the defendants. The defendants, of course, are presumed innocent until and unless they are proven guilty at trial.*

Memorandum Opinion And Order Denying Chapter 12 Standing Trustee's Application For Reimbursement Of Expense

On May 12, 2009, this matter came on for hearing (the "Hearing") on the Trustee's Application for Reimbursement of Expense (the "Application")(Dkt. No. 173) filed by the chapter 12 standing trustee, Harold Barkley, Jr. (the "Trustee"), and the United States Trustee's Objection to Application for Reimbursement of Expense (the "Objection")(Dkt. No. 176). The Court, having considered the Application and the Objection, together with the evidence presented at the Hearing, finds that 28 U.S.C. § 586(e) and 11 U.S.C. § 326(b)[1] prohibit the Court[2] from awarding administrative expenses to the Trustee.[3]

[1] Hereinafter all code sections refer to the United States Bankruptcy Code located at Title 11 of the United States Code unless otherwise noted.

[2] For ease of reference "Court or court" refers to the bankruptcy court when speaking of the court's authority to award or not to award compensation and/or expenses unless otherwise indicated. This distinction is important because the district court at limited times has the authority to review the percentage fee of a standing trustee, whereas the bankruptcy court does not. See 28 U.S.C. § 586(e)(3).

[3] The following constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Rules of Bankruptcy Procedure 7052 and 9014.

Jurisdiction

This Court has jurisdiction over the parties and the subject matter of this proceeding pursuant to 28 U.S.C. § 1334. This is a core proceeding under 28 U.S.C. § 157 (b)(2)(A) and (O). Notice of the Application was proper under the circumstances.

Facts

1. On March 5, 2008, the debtor, Colon Brantley Bazor (the "Debtor"), filed a voluntary petition (Dkt. No. 1) pursuant to chapter 12 of the Bankruptcy Code. As the chapter 12 standing trustee, the Trustee was assigned to the Debtor's case.

2. On November 21, 2008, First State Bank ("First Bank") filed its Motion to Convert or Dismiss ("Conversion Motion")(Dkt. No. 108).[4] The Trustee filed his Joinder in the Conversion Motion (Dkt. No. 114) on December 2, 2008. The Conversion Motion alleged, among other complaints, that the Debtor "[f]ailed to schedule and disclose substantial interest in real property located in Wayne and Clark County (sic), Mississippi." *Id*. at IV-VI. Additionally, First Bank asserted its position as the holder of a partially secured claim on property owned by the Debtor. *Id*. at III. In the Debtor's Answer and Response to First State Bank's Motion to Convert or Dismiss (Dkt. No.126), the Debtor admitted that First Bank was the holder of a secured claim in real property owned by the Debtor. *Id*. at III.

3. Before the Hearing on the Conversion Motion, the Debtor filed a Motion for an Order Pursuant to 11 U.S.C. § 363 to Sell Real Property of Debtor, Outside the Ordinary Course of Business, Free and Clear of Liens, Claims and Interests, With Liens Attaching to Sale Proceeds, and for Other Relief (the "Sale Motion")(Dkt. No. 135) in which he requested court authority to sell his interest in 339 acres of real property (the "Land") on which First Bank held

4 The Court heard the Conversion Motion on February 13, 2009. After conversion, the Trustee was removed as trustee, and Eileen N. Shaffer was added to the case as the chapter 7 trustee on February 25, 2009 (Dkt. No. 168).

Memorandum Opinion And Order Denying Chapter 12 Standing Trustee's Application For Reimbursement Of Expense (continued)

a lien. Pursuant to the Sale Motion, the Debtor agreed to pay the sale proceeds directly to First Bank. First Bank filed its Response to the Motion to Sell Property Under § 363 (Dkt. No. 140) in which it requested that the Court grant the Sale Motion. The Trustee filed the Trustee's Objection to Motion to Sell Real Property (Dkt. No. 148) on January 26, 2009. The Court entered the Agreed Order Granting Motion for an Order Pursuant to 11 U.S.C. § 363 to Sell Real Property of Debtor, Outside the Ordinary Course of Business, Free and Clear of Liens, Claims and Interests, with Liens Attaching to Sale Proceeds and For Other Relief ("Sale Order") (Dkt. No. 156) granting the Sale Motion on February 13, 2009.

4. During the hearing on the Sale Motion held on February 13, 2009, the issue of potential reimbursement in the amount of $5,000.00 to the Trustee arose among the Trustee, First Bank, and the United States Trustee (the "UST"). The Court entered the Sale Order after the Trustee, First Bank, and the UST agreed that the reimbursement issue would be heard by the Court at a later date. The Court also entered an Agreed Order (the "Agreed Order") (Dkt. No. 170) requiring First Bank to hold the $5,000.00 in a separate account until the Trustee filed an application and the Court considered same.

5. On March 3, 2009, the Trustee filed the Application and listed numerous activities that he averred typically result in expenses such as travel to conduct a § 341(a) meeting, filing pleadings, attending hearings, and preparing and submitting a Trustee's investigative report. The Trustee did not indicate the actual cost incurred with any of the activities he listed, but he did "estimate" that he spent $3,210.00 in connection with this case. The Trustee testified at the Hearing that he was currently administering a total of thirty-five (35) chapter 12 cases. He further testified that he received payments in only eleven (11) of those cases, and that he received no payments in the other twenty-four (24) of the chapter 12 cases. The Trustee calculated his expenses for this case by dividing his total yearly chapter 12 estimated expenses of $35,515.00 by eleven (11), the number of paying chapter 12 cases he was administering. The Application seeks to establish that $3,210.00 is the pro-rata share of the yearly expenses that this case should have generated. The Court notes that the Trustee did not calculate his expenses by adding the actual costs he expended and incurred engaging in his trustee capacity in this case.

6. Working under the assumption that the Trustee was applying for administrative[5] expenses under § 503(b), the UST filed the Objection. In the Objection and at the Hearing as well,the UST asserted that the Trustee had not demonstrated the expenses presented were "actual" and "necessary" as required under § 503(b); that the application inadequately explained the reliability of the calculation used to determine the amount of expenses; and that the Trustee was not entitled the funds under 28 U.S.C. § 586.[6]

Discussion

1. Standing Trustee Compensation

To ease the burden of case administration, Congress delegated authority to the Attorney General under 28 U.S.C. § 586(b) to appoint chapter 12 and 13 standing trustees in regions when the number of cases warrants the appointment of a standing trustee.[7] Standing trustees are supervised by the United States Trustee of that region.[8] *Id*. In addition to appointing standing trustees, the Attorney General also fixes the compensation of standing trustees. See 28 U.S.C. § 586(e)(1)-(2).

Pursuant to 28 U.S.C. § 586(e), a standing trustee is compensated by collecting a percentage fee from all payments made under plans administered by the standing trustee. The percentage fee collected by a standing trustee is "fixed" by the Attorney General and subject to statutory limitations. 28 U.S.C. § 586(e)(1)-(3). "Aside from [a] standing trustee's salary, the percentage fee pays for the 'actual, necessary' expenses of the trustee." 1 **COLLIER ON BANKRUPTCY**, ¶ 6.10[1][C] (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev).

By vesting the executive branch with the authority to appoint, supervise, and compensate chapter 12 and 13 standing trustees, Congress has virtually "eliminated the judiciary's role in overseeing compensation for such trustees." *In re Marriot*, 156 B.R. 803, 805 (S.D. Ill. 1993) (holding the bankruptcy court had no authority to review the standing trustee's percentage fee). To reinforce its position that the court had been divested of authority to compensate a standing trustee, Congress implemented § 326(b) which states in pertinent part:

> In a case under chapter 12 or 13 of this title, the court may not allow compensation for services or *reimbursement of expenses of*. . . of a standing trustee appointed under section 586(b) of title 28 . . . ."

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[5] The Trustee clarified at the Hearing that he was, in fact, applying for administrative expenses under 11 U.S.C. § 503(b).

[6] Because this case is decided on different grounds, the Court need not reach what constitutes "actual, necessary" in the context of § 503(b).

[7] Mississippi currently has only one chapter 12 standing trustee.

[8] See also 28 C.F.R. § 58.4, Qualifications for appointment as standing trustee and fiduciary standards.

Memorandum Opinion And Order Denying Chapter 12 Standing Trustee's Application For Reimbursement Of Expense (continued)

11 U.S.C. § 326(b)(emphasis added). [9] As the Sixth Circuit noted in *In re Beard*, the bankruptcy code's statutory framework allows the court broad discretion in granting compensation and fees, but "Congress expressly denied such judicial discretion in a chapter 12 reorganization." 45 F.3d 113 (6th Cir. 1995)(speaking of the standing trustee in the chapter 12 context).

This Court's lack of authority to award compensation or expenses applies to chapter 12 and 13 standing trustees alike. In this case, the Trustee is similarly situated to the chapter 13 standing trustee in the case of *In re Ward*, 132 B.R. 417 (D. Neb. 1991). In *Ward*, the standing trustee applied for administrative expenses under § 503(b) after the case was converted to a chapter 7 case. *Ward*, 132 B.R. at 418. The court held that § 326(b) is clear: the court may not award compensation or expenses to the standing trustee, and the only compensation that a standing trustee may receive is the percentage fee provided under 28 U.S.C. § 586(e). *Id*. See also *In re Lindsey*, 1995 WL 357849 (Bankr. D. Idaho)(denying chapter 12 standing trustee's application for fees and expenses in light of § 326(b)). In the instant case, to the Court's knowledge, the Trustee collected no money in this chapter 12 case that would entitle him to a percentage fee under 28 U.S.C. § 586, before it was converted to a chapter 7 case. Having received no percentage fee, the Trustee applied for administrative expenses under §503(b) to obtain money that was carved out for him in the order approving the sale of the Land.[10] The Trustee, however, is a standing trustee appointed under 28 U.S.C. 586(b), and therefore pursuant to § 326(b), the Court must deny the Trustee's claim for administrative expenses.

2. Bankruptcy Court's Equitable Powers

As to the Trustee's appeal to the Court's equitable powers, § 105 provides no authority for the Court to award expenses to the Trustee. Section 105(a) provides, "The court may issue orders, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11

U.S.C. § 105(a) (emphasis added). As the court held in In re Cross, "[t]he court may not utilize section 105 as general authority to issue any order which contradicts or circumvents § 326(b)." 195

B.R. 440, 442 (D. Neb. 1996). Simply stated, the Court's equitable power may not grant what the bankruptcy code strictly prohibits.

Conclusion

Based on the foregoing, the Application should be denied. The Trustee as a standing trustee is not entitled to expenses under § 503(b) pursuant to § 326(b) and 28 U.S.C. § 586(e). Furthermore, in light of § 326(b)'s strict and clear prohibition against awarding such expenses, this Court is also unable to award the Trustee his expenses under § 105. A separate final judgment will be entered in accordance with Federal Rule of Bankruptcy Procedure 9021.

IT IS, THEREFORE, ORDERED that the Application hereby is denied, and the $5,000.00 currently being held by First Bank pursuant to the Agreed Order shall be applied by First Bank to the Debtor's outstanding indebtedness.

SO ORDERED.

[9] In contrast, the latter half of § 326(b) permits the bankruptcy court to compensate reasonably private chapter 12 and 13 trustees that are appointed on a case-by-case basis. The latter half of § 326(b) provides: "[the court] may allow reasonable compensation under section 330 of this title of a trustee appointed under section 1202(a) or 1302(a) of this title for the trustee's services, payable after the trustee renders such services, not to exceed five percent upon all payments under the plan."

[10] It is not clear where the idea originated to compensate the Trustee with proceeds from the sale of the land. Regardless, the statutory language is clear that Congress intended the standing trustee only to collect a percentage fee pursuant to 28 U.S.C. 586(e), and not compensation or reimbursement of expenses through other agreements.

Northern District News

The Northern District held a series of highly successful mini-seminars across the district in September. The seminar was entitled "Becoming an Effective ECF User" and was presented by court staff in Amory, Greenville and Oxford. Over 80 people attended with approximately 30% being attorneys. For those who were unable to attend, Clerk of Court David Puddister stated that additional training is available at anytime in Aberdeen for those who may need it. Attorneys and/or staff who already have a login and password but feel that they need a refresher course in ECF filing techniques may contact Training Coordinator Cheryl Howell at (662) 319-3558. "A confident and comfortable ECF filer benefits everyone...the court, the clerk's office, the attorney and the client," stated Puddister. "We have a state of the art computer training room in the Cochran Courthouse and we enjoy using it", he added. For efficiency purposes, the Clerk's office would prefer to schedule refresher training when a number sufficient to fill the training room have requested it. However, if it is an emergency situation, the Clerk's office will consider a "one-on-one" session.

Former Jackson Police Officer Sentenced for Bank Fraud and Perjury in a Bankruptcy Case

Stan Harris, Acting United States Attorney for the Southern District of Mississippi, and R. Michael Bolen, United States Trustee for Region 5, announced that **Michael Anthony Jones** was sentenced to 15 months incarceration for conviction of bank fraud and perjury on June 17, 2009, before Chief Judge Henry T. Wingate in U.S. District Court in Jackson. Jones was also sentenced to five years supervised release for the bank fraud and three years supervised release for perjury to run concurrently. Jones is to pay restitution in the amount of $29,652.04.

Jones, who was a Jackson Police Officer from 1992 to 1998, admitted to using his disabled minor son's social security number to obtain a bank loan form the Members Exchange Credit Union to purchase a car. Jones subsequently used that social security number to file three successive bankruptcy cases to forestall repossession of the vehicle by the credit union and also gave false testimony under oath at a bankruptcy hearing before Honorable Edward Ellington, Chief Judge of the U.S. Bankruptcy Court, Southern District of Mississippi in efforts to remain in Chapter 13 bankruptcy.

The case was the result of a joint investigation involving the U.S. Attorney's Office, the United States Trustee's Office, the Federal Bureau of Investigation, and the Office of the Inspector General of the Social Security Administration.

Jackson Attorney Sentence to 32 Months in Prison for Bankruptcy Fraud, Wire Fraud and Money Laundering

John A. Allen, an attorney and resident of Jackson, Mississippi was sentenced on November 5, 2008 to serve 32 months in the Bureau of Prisons, followed by three years of supervised release, for violations of bankruptcy fraud, wire fraud and money laundering, announced U.S. Attorney Dunn Lampton and U.S. Trustee, R. Michael Bolen. The Court also ordered Allen to forfeit proceeds from the fraud totalling approximately $139,475.23.

Allen pled guilty in July to knowingly and fraudulently concealing property, specifically $21925.23, from the trustee charged with control of the debtor's property, from creditors and from the United States Trustee, all in connection with a bankruptcy case filed in the Southern District of Mississippi, with the intent to defeat the provisions of Title 11, in violation of Sections 152 and 2, Title 18, United States Code.

According to factual basis, Allen would obtain funds from his clients for the stated purpose of extinguishing debt and working with creditors, but would instead convert the funds to his personal bank account for his own use. Allen would cause funds to be transmitted by means of wire communication, thereby committing wire fraud and money laundering.

The restitution portion of the sentencing has been scheduled for December 11, 2008.

The Office of the U.S. Trustee referred the matter to the U.S. Attorney for prosecution and Assistant U.S. Attorney Carla Clark prosecuted the case.

Couple Pleads Guilty to Mail Fraud, Bankruptcy Fraud and Falsifying Documents in Bankruptcy Cases

Acting U.S. Attorney Stan Harris, U.S. Trustee R. Michael Bolen, and FBI Special Agent in Charge Frederick T. Brink announced that Robert E. Power, Jr. pled guilty in U.S. District Court today to conspiracy to commit bank and wire fraud, and bankruptcy fraud. Deaundrea Power pled guilty to misprision of a felony for failing to report bankruptcy fraud committed by Robert E. Power, Jr.

Robert E. Power, Jr. and his wife, Deaundrea Power, doing business as Yorkshire Financial Services, targeted homeowners at risk of foreclosure, representing to the homeowners that in exchange for transfer of their property to Yorkshire and a monthly rental payment, Yorkshire would negotiate mortgages or refinance mortgages to allow the homeowner to remain in their home. The Powers would then place the property in bankruptcy unbeknownst to the homeowners and either the home would eventually be foreclosed upon, or sold through straw buyers, via fraudulent loans where the Powers would obtain cash money from the sale. As a result of the Powers' actions, the homeowners lost their homes while the Powers gained a profit from the fraudulent activity.

The Powers are scheduled to be sentenced on November 5, 2009 at 9:00 before U.S. District Judge Tom S. Lee. Robert Power faces a maximum penalty of 10 years in prison and a $250,000 fine, while Deaundrea Power faces up to 3 years in prison and a $250,000 fine.

Notice of Credit Counseling and Debtor Education Waiver Decisions

Pursuant to 11 U.S.C. § 109(h)(2), R. Michael Bolen, U.S. Trustee for Region 5, has determined that approved nonprofit budget and credit counseling agencies for the Eastern District of Louisiana are reasonably able to provide adequate services to the additional individuals who seek credit counseling services as required by 11 U.S.C. § 109(h)(l). This determination shall take effect on September 16, 2009, and shall apply to all cases filed on or after that date.

Further, pursuant to 11 U.S.C. § 727(a)(11) and 11 U.S.C. § 1328(g)(2), R. Michael Bolen, U.S. Trustee for Region 5, has determined that approved instructional courses concerning personal financial management for the Eastern District of Louisiana are adequate to service the addtional individuals who file for bankruptcy relief and are required to complete such instructional courses. This determination shall take effect on September 16, 2009, and shall apply to all cases filed on or after that date.

Fifth Circuit Case Notes

Submitted by Billy Wessler

1. ***In Re: Scotia Pacific Co. LLC***, 508 F.3d 214 (2007)- held tree growing company not an SARE case..
2. ***In Re: Babcock & Wilcox Co.***, 526 F.3d 6824 (2008)- court approved award of ½ of hourly rate for non-working travel time.
3. ***In Re: SI Restructuring, Inc.*** 2008 WL 2469406 (2008-) rejected attempt to subordinate insider claims for "11th hour loans" based on lack of evidence of harm.
4. ***In Re: Monson*** 2009 WL 103693 (2009)- held nondischargeable debt of subcontractor to general contractor where debtor subcontractor abandoned job, was insolvent before job began and misapplied progress payments which certifying lien claimants were being paid.
5. ***Hersh v US ex rel.Mukasey***, 2008 WL 5255905 (2008)- held attorneys to be debt relief agencies, but statute construed to forbid communications only where advising clients to incur debt would be an abuse.
6. ***In Re Repione***, 2008 WL 2801898 (2008)- held testimony that the debtor was upset and had bad dreams inadequate as basis for recovery of damages for emotional injury resulting from wilful stay violation.
7. ***In Re: Seven Seas Petroleum, Inc.***, 522 F.3d 575 (2008)- held claim asserted by bond holders against secured creditor for conspiracy to defraud not to be property of the estate.
8. ***In Re: N.A. Flash Foundation, Inc.*** 50 BCD 112 (2008)-held payments to contractor not a constructive trust, but in light of potential criminal liability found that funds were held for the benefit of subcontractor and therefore payment was not a preference.
9. ***In Re: Yorkshire, LLC*** , 540 F.3d 328 (2008)- dismissed case and granted sanctions where court found case to be a two party dispute in which the debtor was not happy with developments in state court.
10. ***Kane v Caillouet***, 2008 WL 2721157 (2008)-refused to dismiss personal injury claim pursued by Trustee on the ground of judicial estoppel , reasoning that the Trustee had not abandoned the claim and that creditors would be harmed if judicial estoppel was applied and that debtors would not benefit unless there was a surplus in the estate.
11. ***In Re: Miller*** 570 F.3d 633 (2009)- Fifth Circuit joined the Fourth, Seventh, Eighth, Tenth, and Eleventh Circuits in reaching the decision that the Debtor may not surrender a "910 vehicle" in full satisfaction of debt. The Court found that the remaining debt must be treated as an unsecured claim in the bankruptcy plan.
12. **In Re: Dale** (2009)(cite unavailable)- held that the purchase money security interest exception contained in the "hanging paragraph" of §1325(a) applies also to those portions of a creditor's claim attributable to, among other things, the payoff of negative equity of a trade in vehicle, GAP insurance and extended warranty.
13. ***In the Matter of Troy Edwin Tate*** Case No: 08-60953(June 10, 2009) reversed holdings by Bankruptcy Court and District Court which dismissed Chapter 7 case for abuse where debtor was denied right to claim the vehicle ownership deduction on the Chapter 7 means test when the debtor had no loan or lease payment on the car. In finding that such a debtor may claim the deduction for vehicles owned free and clear, the Fifth Circuit adopted reasoning previously adopted by the Seventh Circuit. (Debtor represented in this case by Mary McPherson of Poplarville).

Care Program Update

By Stephanie Jones, Committee Co-chair

I am honored and privileged to follow in Kristina Johnson's footsteps as the new co-chair of the Credit Abuse Resistance Education (C.A.R.E.) Committee. In taking up these reins, I have been humbled by the realization of what a great foundation Kristi and the other organizing members of the committee have laid for the continued success of this program. Kristi should be commended for her enthusiasm and dedication to this worthwhile endeavor.

Since the C.A.R.E. program was implemented, presentations have been given at the following schools: Brookhaven High School, Callaway High School, Canton Academy, Central Hinds Academy, Clinton High School, Forest Hill High School, Jackson Academy, Jim Hill High School, Madison Central High School, Madison Ridgeland Academy, Mooreville High School, North Delta High School, Pelahatchie Attendance Center, Ridgeland High School, Saltillo High School, Shannon High School, South Panola High School, St. Joseph High School, Mississippi College, Jackson State University, and Mississippi Valley State University.

Several members of the MBC have volunteered their time and talents by making presentations at these schools. Many of you have also worked behind the scenes to make this program a success. I would like to express my sincere gratitude to these volunteers: J. Thomas Ash, Bill Davis, Heather Deaton, Derek Henderson, Elizabeth Johnson, Kristina Johnson, Selene Maddox, Ruth McIntosh, Melissa McKinney, Matthew Mestayer, Doug Noble, Julie Ratliff, Eileen Shaffer, Mimi Speyerer, Kenitta Toole, Melanie Vardaman, and Terre Vardaman.

Our committee has some very ambitious goals for the upcoming year. In order to continue to expand the program across the state, we are preparing to mail program information and sign-up forms to approximately 200 Mississippi schools. As you can imagine, a project of this magnitude will require numerous volunteers. For those of you who have not had an opportunity to participate as a program presenter, I would like to encourage you to consider doing so. It is a very meaningful and rewarding experience. You will be amazed at how much good you can do for your community by merely volunteering an hour of your time. If you are interested in participating in the CARE program please contact me at 601-923-7424 or via email at srjones@mstc.state.ms.us.

Business Owner Sentenced in Bankruptcy Fraud Case

Approximately $1,000,000 in Bankruptcy Assets Concealed

In Alexandria, Louisiana, **Bobby D. Curtis**, age 44, a resident of Pineville, Louisiana, was sentenced the week of May 21, 2009 by United states District Judge Dee D. Drell to 37 months in a federal prison and ordered to pay $355,119 in restitution for concealment of approximately $1,000,000 in contracted business an assets of his company, Gen-I-Tech, Inc., United States Attorney Donald W. Washington announced.

Curtis plead guilty January 12, 2009, to an indictment charging him with one count of Concealment of Bankruptcy Estate Assets, and was sentenced May 21, 2009. In addition to the 37-month sentence imposed by Judge Drell, ***Curtis*** will be on supervised release for three years after serving his prison sentence. The one-count indictment charged that beginning in May of 2002 and continuing until at least July 2003, ***Curtis*** concealed from the Bankruptcy Trustee property belonging to the debtor estate by undervaluing Gen-I-Tech, Inc., and failing to disclose assets of the company.

Bobby Dean Curtis, d/b/a Gen-I-Tech and Dina Alexa Curtis, filed a voluntary petition for personal Chapter 13 bankruptcy on May 24, 2002. In the Bankruptcy Schedule B, the defendant stated that the value of Gen-I-Tech was $2,000. The debtors' case converted to a Chapter 11 on August 29, 2002, and subsequently to Chapter 7 on February 12, 2003 and the debtors received a discharge on July 23, 2003. The criminal investigation revealed that Gen-I-Tech was awarded the Westside Alternative School project and received approximately $200,000 in payments prior to his bankruptcy discharge. In addition, the investigation revealed that in February 2003, Gen-I-Tech signed a contract for $1.1 million in e-rate funds on the National Guard Job Challenge and Youth Challenge projects. Subsequent Chapter 13 bankruptcy petitions files in 2004 were dismissed after creditors objected to the plans.

U.S. Attorney Donald Washington stated: "The bankruptcy system is intended to provide eligible and honest debtors a fresh financial start. The responsibility of full financial disclosure should not be taken lightly when a debtor is afforded protection under the bankruptcy laws.

Sentencing in federal court is determined by the discretion of federal judges and the governing statute. Parole has been abolished in the federal system.

This case was investigated by the U.S. Trustee's Office, the Federal Bureau of Investigation, and was prosecuted by Assistant U.S. Attorney Cytheria D. Jernigan.

Opinion Summaries by JUDGE HOUSTON

Prepared by Hall Barkley, Law Clerk

In re Mitchell, 398 B.R. 557 (Bankr. N.D. Miss. 2008)

Debtor objected to priority tax claim of Panola County Solid Waste for costs associated with removing garbage from debtor's property. The court held that Mississippi law provides a mechanism for counties to levy ad valorem taxes to help defray costs of establishing and operating rubbish and garbage disposal systems. The county sought to collect from this debtor for trash collection without a levy pursuant to Mississippi statute. These charges were in the nature of a fee and not a tax. The refusal to renew debtor's driver's license based on non-payment of the fee violated the anti-discrimination provision of the bankruptcy code.

In re Fondren, 398 B.R. 553 (Bankr. N.D. Miss. 2008)

The bank in this case was an oversecured creditor that objected to debtor's proposed Chapter 13 plan on the basis that it failed to provide the bank with the appropriate oversecured interest rate. The court discussed the recent decision of the Fifth Circuit in Drive Financial Services, L.P. v. Jordan, 521 F.3d 343 (5th Cir. 2008). The court held that the limited holding in Drive Financial indicated that the 5th Circuit's earlier decision in Green Tree Fin. Servicing Corp. V. Smithwick, 121 F.3d 211 (5th Cir. 1997) was still binding precedent insofar as the payment of interest on oversecured claims in Chapter 13 cases. Debtors in a chapter 13 are required to pay an oversecured creditor the contract rate of interest.

In re McGregor, 398 B.R. 561 (Bankr. N.D. Miss. 2008)

Debtors brought adversary proceeding against creditor that filed proof of claim and amended proof of claim which were barred by the applicable statute of limitations. The debtors sought actual and punitive damages by way of their complaint. The creditor admitted that the claim was barred by the applicable statute of limitations, and the court disallowed the claim. The court also held that the creditor did not violate the automatic stay by filing the original and amended proofs of claim , and that there is no cause of action under the bankruptcy code for filing a proof of claim that is statutorily barred by a period of limitations.

In re Jones, 400 B.R. 525(Bankr. N.D. Miss. 2009)

Before the court was debtor's Motion to Amend Class Action Complaint and Motion for Class Certification. The debtor filed for relief pursuant to Chapter 13 of the Bankruptcy Code. Her plan was

Opinion Summaries by JUDGE HOUSTON (continued)

confirmed, and, according to the trustee, she paid the debt owed to defendant's through her Chapter 13 plan in conformity with the amounts set forth in the proof of claim. After plan confirmation, defendant acquired hazard insurance covering debtor's property and assessed her account for premiums related to the coverage over the period of the plan totaling $4524.00. Defendants never notified bankruptcy counsel for the debtor, the trustee, or the court of these charges. Defendants never petitioned the court pursuant to Rule 2016(a), Federal Rules of Bankruptcy Procedure, to have the charges approved.

The Chapter 13 Trustee filed her "Trustee's Motion for an Order Declaring 1322(b)(5) Claim of Mid-State Homes Current and Defaults Cured" which was noticed to Mid-State Homes and its attorney, but no response or objection was filed. An Order was subsequently entered by the court finding that the long term debt of Mid-State Homes was current and all defaults cured. The debtor received a discharge, and post-discharge the defendant notified the debtor that her account was delinquent in the sum of $4,677.58 as a result of the insurance premiums plus accrued interest. As a result of the demand for the insurance premiums, the adversary proceeding was filed.

The debtor alleged in her complaint that defendants charged unauthorized fees and expenses to her account in violation of FRBP 2016(a), as well as, that the defendants violated several sections of the bankruptcy code and the court's order declaring the claim of Mid-State Homes current and all defaults cured.

The court held the debtor's discharge and §524(a)(2) did not apply to this cause of action. This was a contractually permissible post-confirmation claim that was part of a long term indebtedness. As a result, the court concluded that the Motion to Amend and the Motion for Class certification were not well taken. The court went on to note that debtor's complaint did set forth the following viable causes of action: 1) the failure of the defendants to comply with FRBP 2016(a); and 2) the failure of the defendants to recognize the courts Order declaring the claim current and all defaults cured.

In Re: George And Patricia Denise Hines
In Re: Mary Elizabeth Pryor , 2009 Wl 1111117 (Bankr. N.D. Miss. 2009)

The Chapter 13 Trustee filed motions for orders declaring the 1322(b)(5) claims current and all defaults cured. Mid-States Homes and the debtors filed responses to the Trustee's motions. Mid-State Homes alleged that the debtors failed to pay hazard insurance premiums during the life of their Chapter 13 bankruptcy cases. The debtors filed responses requesting strict proof of payment of the insurance premiums and asserting their mortgages were current. The Hines maintained hazard insurance throughout the pendency of their bankruptcy case, but did not list Mid-State Homes as the loss-payee on the policy. Pryor did not maintain her own insurance.

The issue was whether FRBP 2016(a) precluded the allowance of the hazard insurance premiums as part of the Mid-State Homes claim in each case. The court held that because Mid-State Homes chose to ignore the easily understandable language of Rule 2016(a), its efforts to collect from the debtors was unreasonable and was disallowed. The court cited to the case of In re Padilla, 379 B.R. 643, 657 (Bankr. S.D. Tex. 2007) in support of its decision.

In Re: George And Patricia Denise Hines
In Re: Mary Elizabeth Pryor , 2009 Wl 1726371 (Bankr. N.D. Miss. 2009)

This was an opinion based on Mid-States Homes Motion for Re-Consideration of the court's earlier opinion discussed immediately hereinabove.

In support of its motion for reconsideration, Mid-State Homes made the following arguments:

1. Rule 2016(a) applies to obligations such as professional fees or other charges that might be assessed against a debtor in bankruptcy, but not to charges such as hazard insurance premiums.
2. The court applied Rule 2016(a) to Mid-State Homes in a novel way without notice or warning.
3. The Hines should have informed Mid-State Homes that they had their own insurance coverage.

As to argument No. 1 the court reviewed the deeds of trust at issue and determined that it was obvious that the professional who drafted the documents for use by Jim Walter Homes and Mid-State Homes saw no distinction between collection costs, including attorney's fees, and the responsibility to maintain hazard insurance coverage. Therefore, the court saw no distinction between professional fees and hazard insurance premiums insofar as FRBP 2016(a) was concerned.

As to argument No. 2, the court pointed out that Rule 2016(a) has remained unchanged for all practical purposes for 26 years and only recently was the court called upon to apply FRBP 2016(a) to a procedure that Mid-State Homes had been doing with impunity for years.

As to argument No. 3. The court found it ironic that Mid-State Homes was attempting to blame the Hines in the dispute when they actually obtained insurance on their own. Both the building contract and the deed of trust required that debtors to maintain hazard insurance on the property. Mid-State could have eliminated the entire dispute with minimal effort by filing FRBP Rule 2016(a) motions. The motion for reconsideration was overruled.

In re Robertson, 2009 WL 1456453 (Bankr. N.D. Miss. 2009)

The debtor objected to the proof of claim filed by the Mississippi Department of Employment Security (MDES). MDES's proof of claim was based on an overpayment of unemployment benefits to the debtor because the debtor failed to report earnings while she was drawing unemployment benefits. MDES asserted it held an unavoidable statutory lien which should be treated as a secured claim. MDES is allowed to recoup overpayment pursuant to Miss. Code Ann. §71-5-19(4) and §§71-5-362 through 71-5-383. A hearing was conducted on debtor's claim objection and MDES's objection to confirmation.

The parties agreed that MDES held a statutory lien which could not be avoided. The only issue remaining was whether MDES's lien attached to the debtor's exempt property. The court had previously held in In re Stewart, Case No. 08-13320-DWH, that MDES held an unavoidable statutory lien for the overpayment of unemployment benefits which had to be treated as a secured claim pursuant to Miss. Code Ann. §71-5-19 ans §§71-5-362 through 71-5-383. The court was called upon in this case to interpret Miss. Code Ann. §85-3-47. As a result of this statute, the issue narrowed as to whether the warrant enrolled by MDES in the Panola County Judgment Rolls was an "assessment". Black's law dictionary defines "assessment" as the "determination

Opinion Summaries by JUDGE HOUSTON (continued)

of the rate or amount of something, such as a tax or damages." Based on this definition, the court held that the amount of the overpayment to the debtors constituted an assessment made by MDES under the statute. Therefore, the statutory lien of MDES attached to the debtor's exempt property.

In re Littleton, 2009 WL 1916729 (Bankr. N.D. Miss. 2009)

The Chapter 7 Trustee objected to the debtor's claim of exemption to a parcel of property located in Tennessee as his homestead. The Chapter 7 Trustee filed an adversary proceeding to set aside a fraudulent conveyance concerning 6.64 acres of land in McNairy County, Tn. that was transferred by the debtort o a caregiver friend. The sole consideration for the transfer of the land to the friend was the friend's agreement to provide care for the debtor while he was sick. The debtor originally purchased the property in 1992. The debtor established his residence and lived on the property until January, 2008. At that time, he moved to his friend's residence in Corinth, Ms. Shortly thereafter he conveyed the property to his friend. After the conveyance was set aside, the debtor filed amended schedules A and C claiming the Tennessee property as exempt pursuant to Tn. Code Ann. Sec. 26-2-301, the Tennessee homestead exemption statute.

The court held that the property could not be claimed as exempt for the following reasons: 1) The debtor did not own the Tennessee property as of the date of filing of his bankruptcy petition; 2) after the Trustee recovered the Tennessee property as a fraudulent conveyance, the debtor did not meet the requirements of 11 U.S.C. § 522(g)(1) in order to claim the property as exempt; and 3) the debtor did not meet the requirements of Tenn. Code Ann. § 26-2-301 because he was not using the Tennessee property as his homestead. The

MISSISSIPPI BANKRUPTCY CONFERENCE
2009 Program

Thursday - December 10, 2009

7:45 - 8:15 **REGISTRATION**
(*Sign in and pick up materials)*

8:15 - 8:30 **WELCOME AND OPENING REMARKS**

Douglas C. Noble, President
Mississippi Bankruptcy Conference

8:30 - 9:30 **CASE LAW UPDATE - RECENT DEVELOPMENTS IN CONSUMER AND COMMERCIAL LAW**

Honorable William Houston Brown
U. S. Bankruptcy Judge (Ret.)
Western District of Tennessee
Memphis, TN

D. Andrew Phillips
Mitchell McNutt and Sams
Oxford, MS

9:30 - 10:30 **CURRENT ETHICAL ISSUES**

Jeffrey J. Jackson
Owen Cooper Professor of Law
Mississippi College School of Law
Jackson, MS

Donald Campbell
Visiting Professor of Law
Mississippi College School of Law
Jackson, MS

10:30 - 10:45 **BREAK**

10:45 - 12:15 **REPRESENTING THE CONSUMER DEBTOR – FILING TO CONFIRMATION**

William L. Fava
Mitchell, Cunningham, & Fava, PC
Southaven, MS

Locke D. Barkley
Chapter 13 Trustee
Northern District of Mississippi
Jackson, MS

R. Gawyn Mitchell
Attorney at Law
Columbus, MS

12:15 - 1:45 **LUNCH ON YOUR OWN**
(Lunch provided for speakers)

1:45 - 3:45 **CURRENT ISSUES IN CONSUMER BANKRUPTCY CASES**

LeAnne F. Brady
Mississippi Department of Employment Security
Jackson, MS

Warren A. Cuntz, Jr.
Chapter 13 Trustee
Southern District of Mississippi
Gulfport, MS

Robert Gambrell
Gambrell & Associates, PLLC
Oxford, MS

Thomas L. Segrest
Graham and Segrest, LLP
Columbus, MS

3:45 - 4:00 **BREAK**

4:00 - 5:00 **VIEWS FROM THE BENCH**

Honorable David W. Houston, III
Bankruptcy Judge
Northern District of Mississippi
Aberdeen, MS

Honorable Edward Ellington
Bankruptcy Judge
Southern District of Mississippi
Jackson, MS

Honorable Neil P. Olack
Bankruptcy Judge
Northern and Southern Districts of Mississippi
Jackson, MS

5:00 - 6:30 **Cocktail Party**

Friday, December 11, 2009

8:00 - 8:30 **MBC ANNUAL MEETING**

Douglas C. Noble, President
Mississippi Bankruptcy Conference

8:30 - 9:30 **CURRENT ECONOMIC ISSUES – STATE OF THE STATE**

Aubrey B. Patterson
Chairman and CEO
Bancorp South
Tupelo, MS

Phil W. Pepper, Ph.D.
State Economist
State of Mississippi
Jackson, Mississippi

9:30 - 10:30 **EFFECTIVE DIRECT AND CROSS EXAMINATION OF WITNESSES**

Patricia W. Bennett
Professor of Law
Mississippi College School of Law
Jackson, Mississippi

10:30 - 10:45 **BREAK**

10:45 - 12:15 **CURRENT ISSUES IN COMMERCIAL BANKRUPTCY CASES**

Honorable Harlin D. Hale
Bankruptcy Judge
Northern District of Texas
Dallas, TX

Stephen W. Rosenblatt
Butler, Snow, O'Mara, Stevens & Cannada
Jackson, MS

John M. Duck
Adams and Reese, LLP
New Orleans, LA

Patrick Darby
Bradley Arant Boult Cummings, LLP
Birmingham, AL

12:15 - 1:45 **LUNCH ON YOUR OWN**
(Lunch provided for speakers)

1:45 - 2:45 **MORTGAGE ISSUES IN CONSUMER BANKRUPTCY**

Michael J. McCormick
McCalla Raymer, PLLC
Memphis, TN

W. Jeffrey Collier
Staff Attorney
Chapter 13 Trustee Locke D. Barkley
Jackson, MS

2:45 - 3:45 **VIEW FROM THE CLERK'S OFFICE**
Practical Pointers for Attorneys and Legal Assistants

David J. Puddister
Clerk
Bankruptcy Court
Northern District of Mississippi

Danny L. Miller
Clerk
Bankruptcy Court
Southern District of Mississippi

3:45 **ADJOURN**

MISSISSIPPI BANKRUPTCY CONFERENCE, INC.

Twenty-Ninth Annual Seminar

December 10 & 11, 2009
Hilton - Jackson
Jackson, Mississippi

Judge T. Glover Roberts

We regret to report the passing of T. Glover Roberts. Glover served as the United States Bankruptcy Judge for the Southern District of Mississippi at Gulfport from 1981 to 1986 , when he left the bench to practice bankruptcy law with the firm of Sheinfeld, Maley & Kay in Dallas Texas. Glover later formed his own firm, Roberts & Grant and had moved back to his native Gulfport shortly after Hurricane Katrina.

Glover was a highly respected bankruptcy attorney, not only in Mississippi, but on a national level. He frequently spoke at national seminars. Glover was a good friend to many of us in the Mississippi Bankruptcy Conference and he will be sadly missed, but fondly remembered.

Bankruptcy Court Statistics Southern District of Mississippi

Bankruptcy Case Filings

Year	Chapter 7	Chapter 13	Chapter 11	Other	Totals
Oct. 2007 – Sept. 2008	**2,875**	**3,327**	**30**	**5**	**6,237**
Oct. 2008 – Sept. 2009	**3,981**	**3,311**	**39**	**4**	**7,335**
Increase/(Decrease) %	**38.5%**	**0.4%**	**30%**	**-20%**	**17.6%**

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